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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-398

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd., file this Brief opposing the Petition for a Writ of Cetiorari filed by Mitsui & Co., Ltd. ("Mitsui-Japan"), and Mitsui & Co. (U.S.A.), Inc. ("Mitsui-USA"). Consistent with their status in the trial court, Petitioners will be referred to herein as "Defendants" and Respondents will be called "Plaintiffs."

QUESTIONS PRESENTED

ARE PLAINTIFFS' ALLEGATIONS SUFFICIENT TO RAISE ANTITRUST CLAIMS AND IS THERE SUMMARY JUDGMENT EVIDENCE TO SUPPORT THOSE CLAIMS?

DO DIRECT COMPETITORS HAVE STANDING TO RECOVER LOSSES SUFFERED BECAUSE OF THEIR EXCLUSION FROM COMPETITION?

STATEMENT

Defendants' lengthy petition for writ of certiorari seeks a review of a decision of the Court of Appeals for the Fifth Circuit entered May 9, 1983. *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 704 F.2d 785 (5th Cir. 1983). That decision resulted from an order of this Court which granted Defendants' request for further consideration of antitrust standing by the court of appeals[1] and remanded the case for review in light of this Court's opinion in *Associated General Contractors* v. *California Council of Carpenters*, ... U.S. ...., 74 L. Ed. 2d 723 (1983).[2] The court of appeals reaffirmed its original decision for the express reason that Defendants' factual assertions are not supported by the record. 704 F.2d at 786. Since the same factual arguments have again been advanced in this petition, Plaintiffs must restate the facts of this case in accordance with what the record actually contains.

The court of appeals limited its review on remand to antitrust standing, which is what Defendants had requested in their 1982 petition[3], and which was the only issue involved in *Associated General Contractors*. Nevertheless, much of the current petition is devoted to matters for which no review was requested in 1982 and which petitioners have failed to preserve. In fact, the current petition attempts to raise again the act of state issue, which was decided by the court of appeals in 1979,[4] and as to which this Court denied certiorari in 1980.[5] Of the five points

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[1] Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, p. 12, n. 8, *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, Cause No. 82-178 ("the 1982 Petition").

[2] 75 L.Ed.2d 475 (1983).

[3] 1982 Petition, p. 12, n. 8.

[4] *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

[5] *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980).

raised by the petition three are procedurally improper and one is now beyond this Court's jurisdiction. Therefore, Plaintiffs must also restate the pertinent prior proceedings both here and below.

(i) Prior Proceedings

This case was filed in 1975, has been twice dismissed, and twice appealed. Both dismissals resulted from a motion to dismiss or for summary judgment filed by the Mitsui Defendants in 1977.[6] The judge before whom this case was then pending first granted the motion on the act of state defense, one of the four defenses advanced,[7] and dismissed the case.[8] The court of appeals held that on the basis of undisputed facts in this case, the act of state doctrine did not apply.[9] Defendants filed a petition for writ of certiorari with this Court, which requested an *amicus curiae* brief from the Solicitor General.[10] The Solicitor General agreed that this was not an act of state case, but urged granting of certiorari to disapprove of the broad language of *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 432 U.S. 904 (1977), upon which Defendants had primarily relied.[11] This Court denied certiorari on February 25, 1980. *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980).

For two years after the first summary judgment was reversed, Plaintiffs attempted to complete discovery. In particular, they

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[6] Rec. No. 66.

[7] Defendants' motion included two points on standing, Rec. Nos. 66, 67, neither of which presented the argument now before this Court. *See* 671 F.2d at 884, n. 8, and accompanying text. The Court of Appeals treated these points as one defense, 671 F.2d at 880, n. 1, and apparently Defendants now agree. Petition, p. 4.

[8] Rec. No. 84.

[9] 594 F.2d at 55-56.

[10] Order of November 26, 1979, No. 79-552.

[11] Brief for the United States as *Amicus Curiae*, No. 79-552.

sought to obtain a ruling on Defendants' 1978 motion for protective order so that they could take the deposition of Mitsui-Japan.[12] At an informal conference on these matters, the trial judge announced that he intended again to dismiss the case. He subsequently entered a two-page order which granted the remainder of Defendants' original motion for summary judgment and adopted "the arguments in Defendants' briefs."[13] The trial judge also held that the case was barred by either the *Noerr-Pennington*[14] or *Parker* v. *Brown*[15] doctrines, which Defendants had not urged.[16]

On appeal, Defendants conceded that the *Noerr-Pennington* and *Parker* v. *Brown* doctrines were not issues in the case and had been "disposed of" by the court of appeals' decision on the act of state doctrine.[17] The court of appeals also reversed as to standing, jurisdiction, and *forum non conveniens*, the three grounds advanced by Defendants, and again remanded.[18] The court's decision was based primarily on its rejection of Defendants' interpretation of the allegations and evidence and on the lack of discovery.[19]

Defendants' second petition requested that certiorari be granted on only two points: standing and jurisdiction.[20] As an

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[12] *See* 671 F.2d at 881-83.

[13] Rec. No. 139, p. 2. *See* 671 F.2d at 882.

[14] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 364 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[15] *Parker* v. *Brown*, 317 U.S. 431 (1943).

[16] Rec. No. 139, p. 2. *See* 671 F.2d at 882, n. 6. The order treated the two doctrines as identical.

[17] Brief of Appellees, p. xxi, No. 82-2175, United States Court of Appeals for the Fifth Circuit.

[18] *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982).

[19] *See, e.g.* 671 F.2d at 881-83, 884, 885, 887, 888.

[20] 1982 Petition, pp. 5-12.

alternative ground of relief, Defendants requested that this Court remand the case to the court of appeals for reconsideration of its holding on antitrust standing in light of recent Supreme Court decisions.[21] That request was granted,[22] and this Court's instructions were followed by the court of appeals, which reconsidered the standing issue in light of *Associated General Contractors*. It once again rejected Defendants' interpretation of the evidence and pleadings and reaffirmed its original decision.[23]

After the third remand to the district court, the new trial judge ordered that discovery and trial preparation be completed and advised counsel that the case would be set for trial as soon as the appellate process was concluded.[24] Defendants have continued to obstruct discovery[25] and have used the maximum time permitted to file their petition.[26] The deposition of Mitsui-Japan, noticed in 1977, has been again postponed at Defendants' insistence.[27] Defendants have still not answered interrogatories seeking market information relevant to the very antitrust issues they argue in this petition.[28]

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[21] 1982 Petition, p. 12.

[22] 75 L.Ed.2d 475 (1983).

[23] 704 F.2d at 786 (1983).

[24] *See* Rec. No. 192.

[25] Since Plaintiffs replied to the last petition for writ of certiorari, Defendants have filed ten more instruments seeking a delay or postponement in this case, which brings the total to twenty-nine thus far. *See* Rec. No. 202, n. 1.

[26] Defendants have actually used somewhat more than the maximum time: copies of the petition were not provided to Plaintiffs until a week after it was filed.

[27] *See* Rec. Nos. 188-91, 201.

[28] After delaying matters for eight months with objections, all of which were overruled, and obtaining one extension, Defendants have still failed to timely file answers. They were due September 22, 1983.

The petition which Defendants have filed purports to request a review of the court of appeals' decision of May 9, 1983. Actually, Defendants ask this Court to set aside a judgment of the court of appeals entered in 1979 and to review three other legal theories which Defendants have failed to preserve. The only question which Defendants have properly presented is antitrust standing, which is the primary focus of this reply.

(ii) **The Allegations and Evidence**

This case does *not* involve competition between two companies for the right to purchase logs from an Indonesian firm and does *not* involve the inducement or instigation of foreign governmental action. Those two propositions are the factual basis for all of the various arguments Defendants have included in their petition.[25] Both propositions are contradicted by the pleadings, are against the great weight of the evidence, and yet are advanced in support of a summary judgment.

This case instead arises out of the efforts of the Plaintiffs to compete with Defendants by entering the business of producing and exporting Indonesian logs and lumber products, and importing such products into the United States.[26] To do so, Plaintiffs entered a joint venture with an Indonesian firm (Telaga Mas)

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[25] *See* Petition, pp. 8, 12, 13, 17, 21.

[26] Complaint, ¶¶ 16, 50, Rec. pp. 389, 402: "Plaintiffs would show that their proposed operation consisted of harvesting and exporting logs and lumber products from Indonesia, and importing such materials into several markets, but that their chief market was the United States. Until prevented by the conspiracy herein alleged, [Plaintiffs] attempted to enter into competition with [Defendants] in the exporting and sale of logs, lumber and wood products from Indonesia to the United States; and in the importing and sale of processed goods and machinery from the United States into Indonesia." *Id.* at ¶ 50. *See* 671 F.2d at 881.

which had been granted a concession by the Indonesian government.[31] That concession was unique in that it contained substantial quantities of highly valuable agathis timber.[32] Plaintiffs and Telaga Mas agreed to divide the concession area into two parts. The southern portion was to be operated independently by Telaga Mas, and the northern three-quarters of the concession was to be operated by a joint venture between Telaga Mas and Plaintiffs.[33]

None of the Plaintiffs had ever agreed to purchase logs from Telaga Mas, and there is neither an allegation nor any evidence that they did. Plaintiffs were to be engaged in direct production operations conducted by a joint venture in which they had a controlling interest.[34] The Plaintiffs had made preparations to market the production from this operation and had specifically designated the United States as their main market.[35]

After elimination of Plaintiffs, Defendants structured their own operation as a purchase and sales contract between Telaga

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[31] Complaint, ¶¶ 27, 28; Rec. pp. 393, 394.

[32] Deposition of Earl Cone, p. 296. *See, e.g.* Memo from Jakarta to Tokyo dated Feb. 25, 1972, J-1830-33, Pl. Trial App. 059-62 (Rec. No. 75); Telex from Jakarta to Tokyo dated March 30, 1972, J-1584, Pl. Trial App. 043-44 (Rec. No. 75).

[33] Joint Venture Agreement of Dec. 24, 1970, Art. III, ¶¶ (7), (8), Pl. Trial App. 201 (Rec. No. 75); Complaint ¶ 28, Rec. p. 393; Pl. Trial App. 113-14 (Rec. No. 75).

[34] Complaint, ¶¶ 28, 33, Rec. pp. 389, 395-96, 402; Agreement of July 14, 1971, ¶ 4, Pl. Trial App. p. 291 (Rec. No. 75); Final Agreement of July 1, 1971, Pl. Trial App. 212-225 (Rec. No. 75); affidavit of Gautama, ¶ 5, Pl. Trial App. 160 (Rec. No. 75).

[35] Complaint, ¶ 57; Rec. p. 405; *see, e.g.* Deposition of E. V. Pedersen, Vol. II, pp. 99-100; Vol. V, pp. 601-07; Vol. VI, pp. 681-83, 770-75; Vol. VII, pp. 877-88 (Rec. No. 73). Marketing plans submitted to the Foreign Investment Board in 1972 represented that "[t]he primary market for plywood will be United States of America and Europe." It was further stated that "[t]he main market is the United States of America with estimated sales as follows. . . ." Foreign Investment Application, Form B, Pl. Trial App. p. 234 (Rec. No. 75); *see also* Affidavit of E. V. Pedersen, ¶ 5, Rec. p. 553.

Mas and Mitsui-USA.[36] This arrangement actually disguised an illegal joint venture which Defendants supervised and controlled so that "it should take on a form [on the surface] in which [Telaga Mas] operates by itself."[37] Although this unique concession area was Plaintiff's sole source of production and was vital to its operations, Defendants have numerous production operations in Indonesia and elsewhere.[38] Both Defendants also market substantial quantities of logs and lumber products and import substantial quantities of lumber products into the United States.[39]

The proposed operation by the joint venture between Plaintiffs and Telega Mas was subject to the approval of the Indonesian government.[40] This approval was obtained on July 1, 1971, when the newly-formed joint venture between Plaintiffs and Telaga Mas entered into a contract with the government setting forth the technical, capital, and organizational requirements of the operation.[41] The contracting parties to this agreement were the

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[36] Loan Agreement dated July 28, 1972, between Mitsui & Co. (USA), Inc. and Telaga Mas, U-1874-77, Pl. Trial App. pp. 355-58 (Rec. No. 75); Purchase and Sales Contract of Logs dated July 28, 1972, Art. 9, U-1878, Pl. Trial App. pp. 359-63 (Rec. No. 75).

[37] Complaint, ¶ 46. "Since it may cause a big problem if we bring out new joint enterprise scheme, it should take on a form surfacely in which TM Company operates by itself." Telex from Jakarta to Tokyo, September 20, 1971, J-1896-1900, Pl. Trial App. pp. 071-77 (Rec. No. 75). "Our company should not act surfacely." Telex from Jakarta to Tokyo dated December 13, 1971, J-1944-43, Pl. Trial App. pp. 087-88 (Rec. No. 75). Complaint, ¶ 52.

[38] *See, e.g.*, Answers of Defendant Mitsui & Co., Ltd., to Plaintiffs' First Set of Interrogatories, Nos. 3, 4, 9, 34, 35. For detailed references to the evidence, *see* Appellants' Reply Brief, pp. 11-12, No. 81-2175.

[39] *Id.* Answers Nos. 14, 29, 31, 32. As of 1980, Mitsui-USA imported approximately $70,000,000 worth of lumber products into the United States per year. Deposition of Jun Sasaki, Vol. I, p. 57 (Rec. No. 122).

[40] *See* 594 F.2d at 49.

[41] Complaint, ¶ 33, Rec. pp. 395-96, Pl. Trial App. 115, 116 (Rec. No.

joint venture between Plaintiffs and Telaga Mas on the one hand and the Indonesian government on the other.[42] By its very nature, the agreement required the continued existence of the joint venture entity. If the parties could not cooperate, or the joint venture were destroyed, the contract could not be performed.[43]

Mitsui-USA first alerted Mitsui-Japan to the Plaintiffs' proposed operation in February of 1971.[44] Although Mitsui-Japan initially had no objection to the operation, it was subsequently decided that it must be stopped.[45] Defendants' actions were specifically directed at preventing these Plaintiffs from entering competition, but there is evidence that these actions were part of a larger scheme which was directed against other companies as well. Defendants' records expressly state their intention to establish a monopoly on production from the area and reveal their desire to exclude Korean and Taiwanese companies as well as

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75); Final Agreement of July 1, 1971, Pl. Trial App. 212-225 (Rec. No. 75); Affidavit of Gautama, ¶ 5, Pl. Trial App. 160, 161 (Rec. No. 75).

[42] Final agreement of July 1, 1971, Pl. Trial App. (Rec. No. 75), p. 212; Affidavit of Gautama, ¶ 5, Pl. Trial App., pp. 160, 161 (Rec. No. 75).

[43] Affidavit of Gautama, ¶ 5, Pl. Trial App., pp. 160, 161 (Rec. No. 75).

[44] *See* Telex from Jakarta to Tokyo dated Nov. 5, 1971, J-1973-76, Pl. Trial App. 91 (Rec. No. 75); Deposition of Eiji Yashiro, Vol. II, pp. 383-84.

[45] Complaint, ¶¶ 43-46, Rec. pp. 399-401. "Since this forest area is very valuable as a source for the good quality Agathis lumber, we are of the same opinion with you that it must be secured by overcoming all the difficulties. Therefore, we expect that you will take necessary measures so that Min Tjae and Tek Long will cancel the corporation problem with Forest Products in the earliest time, and they will cooperate with our company in the future in the direction to reconstruct the company." (Telex dated March 30, 1972 from the Tokyo office of Mitsui & Co., Ltd. to its Jakarta office, J-1584, Pl. Trial App. 043-44). *See* Memo from Jakarta to Tokyo dated Aug. 4, 1971, J-1988-89, Pl. Trial App. 096-98 (Rec. No. 75).

Plaintiffs.[46] And, although Defendants' specific attack was directed at Plaintiffs' production capability, Defendants knew that Plaintiffs constituted an American effort to enter the logging and lumber products industry, and it was for this reason Defendants decided that the joint venture must be stopped.[47]

Defendants did not prevent Plaintiffs from entering into the business of producing and marketing logs and lumber products by petitioning the government of Indonesia or instigating some government action. Defendants' employees have recently testified that they never even discussed the matter with any official of the Indonesian government.[48] Instead, Defendants arranged a takeover of Plaintiffs' joint venture partner and caused that partner to withdraw from the joint venture with Plaintiffs in violation of its contractual duties.[49] Defendants recognized from the outset that if the joint venture were destroyed, the agreement with the government would be cancelled by operation of law.[50] In

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[46] To prevent the threatened intrusions of Korean and Taiwanese competitors, Defendants decided "it will be necessary to monopolize [the forest area] for our company as soon as possible." Memo from Jakarta to Tokyo dated Feb. 25, 1972, J-1830-33, Pl. Trial App. 059, 60 (Rec. No. 75).

[47] *See, e.g.*, Telex from Jakarta to Tokyo dated March 28, 1972, J-1597-98, Pl. Trial App. pp. 049-50 (Rec. No. 75). Mitsui-Japan was fearful that Plaintiffs would accept the offer of the "pro-Mitsui" officer to have Telaga Mas perform its agreement for an additional payment of $3,500,000. *Id.* "Since the capital of FP is only US$500,000, it seems that it cannot accept this. However, there is a support from USA, and the Agathis Woods in the TM forest area have been attracting the attention of every company, we cannot exclude a possibility of support from any source." Telex from Jakarta to Tokyo dated March 28, 1972, J-1594-96, Pl. Trial App. pp. 046-48 (Rec. No. 75).

[48] *See* Deposition of Eiji Yashiro, Vol. II, pp. 531-33, Deposition of Masashi Yamada, Vol. IV, pp. 462-63.

[49] The summary judgment evidence of Defendants' destruction of the joint venture is summarized in the first opinion of the court of appeals, 594 F.2d at 50. Mitsui's actions are established by their own records.

[50] Although they were confused as to time requirements, the Mitsui

fact, Defendants' records reflect that their involvement was kept a deliberate secret from that government.[51] There is also no evidence that the government disapproved of Plaintiffs or their participation in the timber industry. On the contrary, the government attempted to mediate the dispute instigated by Defendants and confirmed that the operation would be permitted if the joint venture partners could cooperate.[52]

As Defendants had planned, the destruction of the joint venture resulted in the automatic cancellation of the joint venture's agreement with the government.[53] But Defendants conceded below that Plaintiffs had already been put out of business nearly a year before the inevitable cancellation of the joint venture's contract occurred.[54] Furthermore, there is evidence that Defendants planned to thwart Plaintiffs' operation by other

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Defendants recognized that the joint venture agreement would lapse if Telaga Mas refused to perform. *See, e.g.*, Memo from Tokyo to Jakarta dated Oct. 1, 1971, J-1882-85, Pl. Trial App. 065-66 (Rec. No. 75). "Following the suggestion of the legal department, Telaga Mas will not respond to any discussion with Forest Products until December 18 and will not sign any document. . . ." Telex from Jakarta to Tokyo dated Nov. 13, 1971, J-1941-43, Pl. Trial App. 055-57 (Rec. No. 75). When the Director General encouraged settlement negotiations, Jakarta reported that "We have persuaded him [the Telaga Mas officer aiding Mitsui] to botch the whole talk by asking unreasonable demands. . . ." Memo from Jakarta to Tokyo, March 28, 1972, J-1594, 96, Pl. Trial App. 046-48 (Rec. No. 75).

[51] *See* footnote 37, *supra*.

[52] Letter dated February 18, 1973, Pl. Trial App. 352 (Rec. No. 75). Telegram from American Embassy dated March 26, 1973, Pl. Trial App. 177078 (Rec. No. 75). Letter dated April 19 from Soedjarwo, Director General of Forestry, to Mr. Soelistio, attorney for Forest Products, Pl. Trial App. 350 (Rec. No. 75). State Department Memorandum dated Nov. 20, 1975, Pl. Trial App. 179-80 (Rec. No. 75).

[53] Letter dated February 19, 1973; Pl. Trial App. 352 (Rec. No. 75).

[54] Def. Trial Brief, p. 25, n. 73. Defendants conceded that the takeover by the corporation Telaga Mas by the pro-Mitsui faction in 1972 is "what really killed the deal."

means, including preventing Plaintiffs from obtaining financing from the United States Export-Import Bank.[55]

After the demise of the joint venture, Mitsui-USA entered into a contract with Telaga Mas which required Plaintiffs' former joint venture partner to sell all production to Mitsui-USA and put the "Telaga Mas" operation under Defendants' direct supervision and control.[56] All production from the concession was purchased by the Houston office of Mitsui-USA and then resold to Mitsui-Japan at a substantial profit.[57] Deprived of their source of production, Plaintiffs were prevented from entering into competition in the production and marketing of Indonesian logs and lumber products and the importation of such products into the United States.[58] Defendants' actions have resulted in a substantial reduction in competition in these activities and an increase in the price of such goods imported into the country.[59]

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[55] At about the same time that Mitsui-Japan was terminating Plaintiffs' joint venture, Mitsui-USA made what amounted to a gift to Henry Kearns (then President of the Export-Import Bank) by buying worthless stock for approximately $400,000. *See* Yokoya deposition, Vol. II, pp. 120-22, 137, 149-50, 151-60 (Rec. No. 120). *See United States* v. *Kearns*, 595 F.2d 729 (D.C. Cir. 1978). It is apparently Defendants' position that they desired Mr. Kearns' cooperation for some other reason. *See* deposition of Takeuchi.

[56] Loan Agreement dated July 28, 1972, U-1874-77 between Mitsui & Co. (USA), Inc. and Telaga Mas, Pl. Trial App. pp. 355-58 (Rec. No. 75); Purchase and Sales Contract of Logs dated July 28, 1972, Art. 9 U-1878-82, Pl. Trial App. pp. 359-63 (Rec. No. 75). Telex from Tokyo to Jakarta dated May 10, 1972, J-1544-47, Pl. Trial App. pp. 037-38; Complaint § 52, Pl. Trial App. 123; Telex from Jakarta to Tokyo dated December 13, 1971, J-1944-45, Pl. Trial App. pp. 087-88. Memo dated September 20, 1971 from Jakarta to Tokyo, J-1896-1900, Pl. Trial App. pp. 071-77. Telex from Tokyo to Jakarta dated May 10, 1972, J-1544-47, Pl. Trial App. pp. 037-38. *See also* discussion pp. 19, 20, Plaintiffs' Reply to Motion to Dismiss (Rec. No. 75).

[57] *See* 671 F.2d at 883.

[58] Complaint, ¶¶ 50, 52.

[59] Complaint, ¶¶ 56-58.

REASONS THE WRIT SHOULD BE DENIED

(i) This interlocutory appeal presents only procedural and evidentiary questions, does not involve principles of general application, and review by this Court would further delay a trial of this case without disposing of the litigation.

The first and foremost reason that Defendants' petition for writ of certiorari should be denied is that this case does not present for review the issues which Defendants describe. The only legal issues which this case presents are purely procedural: whether summary motions are to be based on the pleadings and on undisputed evidence in the record, and whether Plaintiffs are to be permitted to complete discovery before they are required to adduce complex evidence of intent and market effect. The court of appeals has three times held that Defendants' legal theories are not supported by the pleadings or evidence in this case and has twice noted that Plaintiffs have been denied essential discovery.[60] That this is the primary basis of the court's holding was expressly reiterated in its recent *per curiam* opinion on remand from this Court.[61]

In the petition before this Court, Defendants' legal theories are based on what they describe as "the gravamen" of the allegations;[62] those allegations which do not accord with their theories are simply dismissed as not "plausible."[63] Both here and below, Defendants' arguments are premised on factual statements which are flatly contradicted by the record.[64] The court of appeals has described Defendants' arguments as "a series of mere assertions, unsupported by the pleadings or by summary

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[60] 594 F.2d at 54, 671 F.2d at 883-84, 704 F.2d at 786.

[61] 704 F.2d at 786.

[62] *See, e.g.*, Petition, pp. 8, 10 ("gravamen"); 9 ("gist").

[63] *See* Petition, p. 13.

[64] *See* notes 29-59, *supra*, and accompanying text.

judgment evidence."[65] If Defendants' petition were granted, this Court would not be presented with legal questions of general application to other cases. The Supreme Court would instead be required to examine a voluminous record to determine if the court of appeals was correct in rejecting Defendants' interpretations of the pleadings and evidence.

The sole purpose of this time-consuming effort would be to postpone the trial on the merits which will occur as soon as this appeal has been concluded. Decision of the issue presented by this appeal would not be dispositive of this litigation. Plaintiffs have valid common law claims which are supported by both diversity and pendent jurisdiction.[66] In addition, Plaintiffs have alleged claims under both Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, which are not here presented.[67] Because all these claims arise out of the same events, an advance ruling on the Section 1 claims would not even appreciably shorten the trial.

(ii) **The court of appeals was correct in rejecting Defendants' evidentiary arguments and holding that Plaintiffs have standing under Associated General Contractors.**

The only issue which is presented by this appeal is whether Plaintiffs' allegations give them standing to recover for injuries sustained by reason of a violation of Section 1 of the Sherman Act. This Court should deny the petition and should not review the decision of the court below as to that issue for several reasons.

First, the question which is posed by Defendants' petition is neither raised nor even suggested by the actual facts of this case. As discussed above, this litigation does not involve competition

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[65] 671 F.2d at 885.

[66] Complaint, ¶¶ 14, 62.

[67] Complaint, ¶¶ 12, 55.

between two companies to purchase logs from an Indonesian seller.[68] The complaint alleges:

> Plaintiffs would show that their proposed operation consisted of harvesting and exporting logs and lumber products from Indonesia, and importing such materials into several markets, but that their chief market was the United States. Until prevented by the conspiracy herein alleged, [Plaintiffs] attempted to enter into competition with [Defendants] in the exporting and sale of logs, lumber and wood products from Indonesia to the United States; and in the importing and sale of processed goods and machinery from the United States into Indonesia.

All of Defendants' lengthy standing analysis has been based on an attempted transmutation of the elemental facts of this case.[69] Whether a plaintiff injured by increased competition can recover under the antitrust laws is a question which will have to be decided in some other case,[70] because it is not presented in the case at bar. The record in this case is devoid of any allegation or evidence which would support the petition's claims that Defendants' activities have increased competition in *any* area of economic activity. It is inconceivable that the elimination of a new entrant by established multinationals somehow increased competition in the production and marketing of logs and lumber products. The complaint specifically alleges harm to competition in these activities and a reduction in competition in the importation of logs and lumber products into the United States.[71]

Defendants' claim that this case involves the substitution of one competitor for another is merely a variation on the same theme.[72] In fact, this would not be a substitution case even if the

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[68] *See* footnotes 29-49, *supra*, and accompanying text.

[69] *See* Petition, pp. 2, 8, 10-11.

[70] If it has not already been decided in *Brunswick Corp.* v. *Pueblo Bowl-a-Mat*, 429 U.S. 477 (1977).

[71] Complaint, ¶¶ 56, 57.

[72] Petition, p. 11.

area of competition were artificially limited to the purchase of logs from one concession.[73] But that is not the area of competition involved in this litigation.[74] Summary motions must be decided on the allegations which the complaint actually contains unless there is some reason to disregard them. Here the theory that competition was unaffected by Defendants' conduct is based entirely on Defendants' proposed definition of the area of competition. That definition conflicts with express allegations in the complaint, and is contrary to the weight of the evidence thus far adduced.

These Plaintiffs sought to produce and market logs and lumber products and import them into the United States.[75] They had made extensive preparations to engage in both production and marketing.[76] They had never agreed to be purchasers of logs from Telega Mas or anyone else.[77] Defendants were and are powerful forces in the production, marketing, and importation of

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[73] Plaintiffs' agreement with Telaga Mas related to the development of the northern section which was not being utilized. Defendants decided to take over the entire area and market it only to their own customers. *See, e.g.*, Memo from Jakarta to Tokyo dated February 25, 1972, J-1830-33, Pl. Trial App. pp. 59-62 (Rec. No. 75). The subsequent purchase contract contains an exclusive-dealing provision and refers to the entire 160,000 hectares. Purchase and Sales Contract of Logs dated July 28, 1972, U-1878-82, Pl. Trial App. pp. 359-63 (Rec. No. 75). Plaintiff, on the other hand, had even offered to sell to Mitsui. Complaint, ¶ 35, Rec. p. 396.

[74] *See* footnotes 29-49, *supra*, and accompanying text.

[75] Complaint, ¶ 50.

[76] Complaint, ¶¶ 15, 27, 28, 35, 50 (obtaining production source); Deposition of Herbert Ziegler, pp. 5-12 (Rec. No. 98); Deposition of Theo N. Law, pp. 18-19 (Rec. No. 103); Deposition of Charles Houston, p. 12 (Rec. No. 56). For a discussion of these preparations see Brief of Appellants, pp. 7-8; Appellants' Reply Brief, pp. 7-9. Among other things, the evidence flatly contradicts Defendants' irrelevant assertions that Plaintiffs lacked the requisite financial resources. *See* Petition, p. 17, n. 15.

[77] *See* footnotes 30-35, *supra*.

such products.[70] They sought to and did prevent Plaintiffs and others from competing with them in these activities by controlling the available source of production.[71] Plaintiffs seek by this suit to recover the profits they would have made had they been permitted to enter direct competition with these Defendants.[72] What the record in this case actually reveals — as opposed to Defendants' description of the "gravamen" of the litigation — is merely traditional antitrust plaintiffs seeking traditional antitrust damages.

In *Associated General Contractors*, this Court listed five factors which were to be taken into consideration in determining whether a particular plaintiff could assert a claim for injuries sustained by reason of anything forbidden by the antitrust laws.[73] In the case at bar, all five of these factors compel recognition of Plaintiffs' standing. Plaintiffs were direct competitors with Defendants in the production and marketing of logs and lumber products.[74] Defendants intended their activities to injure these particular Plaintiffs — whom their records mention by name.[75] The injury to Plaintiffs was the direct and intended result of Defendants' efforts to establish a monopoly and to

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[70] *See* footnotes 38, 39, *supra*. *See also* Appellants' Reply Brief, No. 81-2175, pp. 11-12.

[71] Complaint, ¶ 52. *See* 671 F.2d at 886; 704 F.2d at 786.

[72] Complaint, ¶ 59. "The wrongful acts of Defendants and their co-conspirators have deprived [Plaintiffs] of [their] contract and concession rights, of [their] ability to enter and compete in the market, and of the profits [they] would have derived from such operations."

[73] *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 75 L.Ed.2d 723, 737-43 (1983).

[74] *See* footnotes 29-49, *supra*.

[75] *See e.g.*, Telex dated March 30, 1972, from Jakarta to Tokyo, Pl. Trial App. pp. 043-44; Telex from Jakarta to Tokyo dated August 9, 1971, Pl. Trial App. pp. 009-010; Telex from Jakarta to Tokyo dated August 20, 1971 (Rec. No. 75). The American Plaintiff is referred to as "Ziegler", from its description in the December 24, 1970, agreement as "Ziegler-Forest." Ziegler Steel Service Company, which had guaranteed the performance of Forest Products,

deprive these Plaintiffs of their production capability.[84] Defendants concede that this case does not involve complex problems of proof relating to the apportionment of damages.[85] And the damages Plaintiffs seek are not only "related" to the anticompetitive nature of Defendants' misconduct, but are the very profits Plaintiffs would have earned had competition not been injured.[86] Plaintiffs clearly have standing to bring this suit.

(iii) **Defendants' jurisdictional argument has not been preserved for review; furthermore, the facts disclosed by the record fully support the court of appeals' finding of jurisdiction.**

As noted, Defendants included the question of federal jurisdiction as one of two points on which they asked this Court to grant *certiorari* in their second petition.[87] As an alternative ground of relief, they asked for remand of the standing issue to the court of appeals.[88] This Court's order[89] remanded to the court below for reconsideration in light of *Associated General Contractors*, a case which involved only standing and did not involve "extraterritorial" jurisdiction.[90] Plaintiffs believe that this Court's order implicitly denied the Petitioners' request for a review of their jurisdictional arguments. In any event, interlocutory certiorari petitions should be limited to the issues addressed by the last opinion of the court below. The alternative,

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was described as an affiliated company. *See* Ziegler deposition, pp. 5-12 (Rec. No. 98).

[84] Complaint, ¶ 5d.

[85] Petition, p.11.

[86] Complaint, ¶¶ 59, 60.

[87] 1982 Petition, pp. 4, 5.

[88] 1982 Petition, p. 12, n. 8.

[89] *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, ... U.S. ...., 103 S.Ct. 1244 (1983).

[90] 74 L.Ed.2d 723, 103 S.Ct. 897.

as this case demonstrates, is delay while issues are relitigated at the whim of the litigants.

The jurisdictional argument in the current petition is the same as that advanced in the 1982 petition. The court of appeals found jurisdiction over restraints which directly or substantially affected the flow of commerce into or out of the United States. The actual facts of this case not only satisfy that test, but also satisfy the test employed in *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), which Defendants cite in an attempt to establish a conflict between the circuits. No such conflict exists because the case before this Court differs from *National Bank of Canada* in several important respects. In the instant case, there has been no trial on the merits, many of Defendant's wrongful acts occurred within the United States, and there was an anticompetitive effect on commerce.

This case involves the efforts of an American importer and its Japanese parent to restrict competition in the importing of logs and lumber products into the United States.[91] The Plaintiffs are an American corporation and two foreign subsidiaries. The restraint was accomplished by depriving Plaintiffs of a source of production on foreign soil. The contract by which Defendants accomplished their aims was with the American Defendant, which actually purchased all production and then resold it to its Japanese parent.[92] Not only was the restraint accomplished by a transaction within the actual course of United States commerce, but there is evidence of other acts in furtherance of the conspiracy which occurred on American soil. There are express allegations that Defendants intended to affect United States commerce and that their conduct has substantially reduced competition in the importation of logs and lumber products into

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[91] *See* footnotes 29-49, *supra*, and accompanying text; 671 F.2d at 883; 704 F.2d at 786.

[92] *See* 671 F.2d at 883.

this country.[93] These facts establish jurisdiction. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927).

Defendants' jurisdictional argument is based entirely on the same factual misstatements which they advance in connection with standing. They deny an "anticompetitive effect" on United States commerce on the theory that competition between Plaintiffs and Defendants was limited to the purchase of logs from an Indonesian logger.[94] That assertion is contradicted both by the pleadings and by evidence that the court below has described as "ample."[95]

There is obviously no conflict between the court of appeals' decision in this case and the decision of the Seventh Circuit in *Bunker Ramo* v. *United Business Forms*, 1983-2 Trade Cas. (CCH) ¶65,515 (7th Cir. July 26, 1983). The jurisdictional question presented by *Bunker Ramo* was whether the plaintiffs' cause of action had a sufficient nexus with interstate commerce and was not whether the Sherman Act should be applied extraterritorially. In finding jurisdiction, the court warned against dismissing antitrust cases on the pleadings: "The impact the defendants' activities may have upon interstate commerce is a question of fact not normally susceptible of determination without scrutiny of the proof that may be offered." 1983 — 2 Trade Cases at p. 68526. The court dismissed the plaintiffs' case (with leave to replead) because "plaintiff has not alleged any anticompetitive effect arising from Defendants' conduct." Id. at 68,528. Here, the court below required and found sufficient summary judgment evidence of anticompetitive effect.[96]

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[93] Complaint, ¶¶ 52, 56-58.

[94] Petition, pp. 12, 15.

[95] 671 F.2d at 883.

[96] *See* 671 F.2d at 889, n. 16.

(iv) **The act of state issue was ruled upon in 1979 and is not before this Court.**

In 1979, the court of appeals reviewed the undisputed facts relevant to the act of state defense and concluded — not just that Defendants were not entitled to a summary judgment — but that the act of state doctrine does not apply in this case. 594 F.2d at 55-56. After requesting and reviewing an *amicus curiae* brief by the Solicitor General, this Court denied certiorari. 445 U.S. 903. If Defendants are permitted to reassert their act of state defense at any convenient juncture, then the efforts of the courts, the parties, and the Solicitor General have accomplished nothing. The act of state issue was not relitigated to the trial court in connection with the second summary judgment and was not raised on the second interlocutory appeal to the court below or in the second interlocutory petition for writ of certiorari. Plaintiffs submit that this Court, as a matter of judicial economy or as a matter of jurisdiction, should not grant a petition for certiorari filed four years after the decision which is attacked. *See Pearce* v. *Germania Insurance Co.*, 96 U.S. 461 (1978); *Magwire* v. *Tyler*, 84 U.S. (17 Wall.) 253 (1873); *Washington Bridge Co.* v. *Stewart*, 44 U.S. (3 How.) 13 (1845). The cases cited by Defendants in support of their request to reopen the court of appeals' 1979 decision are not pertinent here. Both cases involved denial of certiorari on an interlocutory appeal followed by grant of certiorari after trial on the merits.[27]

Defendants claim no new evidence bearing on the act of state defense, although there has, in fact, been new evidence: Defendants' employees admit that they never even discussed this matter with any official of the Indonesian government and do not know of anyone else who did.[28] Defendants' anticompetitive

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[27] *Mercer* v. *Theriot*, 377 U.S. 152 (1964); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1972).

[28] Deposition of Eiji Yashiro, Vol. II, pp. 531-33, 561-62; Deposition of Masashi Yamada, Vol. IV, pp. 462-63.

scheme was effected in this case entirely by the disruption of contractual relations between private parties.[99] The Indonesian government was simply not involved in this matter, and the act of state doctrine clearly does not apply.

The distinction between this case and the Second Circuit's decision in *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) was discussed in reply to Defendants' 1979 petition.[100] The current petition attempts to establish a conflict with the Ninth Circuit, but the supposedly conflicting decision actually cites the instant case with approval.[101] *See Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,523 (9th Cir. Aug. 2, 1983). That case involved a concession allegedly obtained by bribery.

(v) **The court of appeals was clearly correct in holding that this case cannot be dismissed under the forum non conveniens doctrine, and that issue has not been preserved for this Court's review.**

In the two *National City Lines* cases[102] this Court clearly held that the common law doctrine of *forum non conveniens* has been overridden by statute in antitrust cases. The statutes permit transfer of an antitrust case to another United States district court, but not dismissal.[103] The court below correctly followed

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[99] *See* footnotes 48-54, *supra*, and accompanying text; 594 F.2d at 54.

[100] Brief in Opposition to Petition for Writ of Certiorari, pp. 13-15, 79-552.

[101] In fact, at least one other Ninth Circuit decision has also cited the instant case with approval. *See Northrup Corp.* v. *McDonald Douglas Corp.*, 705 F.2d at 1030, 1048 (9th Cir. 1983). If there is a conflict with the Fifth Circuit, the Ninth Circuit seems unaware of it.

[102] *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948); *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949).

[103] Clayton Act, ¶ 4, 15 U.S.C. ¶ 15, 22; 28 U.S.C. ¶ 1404 (a).

that rule.[104] In the case at bar, dismissal would do especial violence to the statutory policy discussed in the *National City Lines* decisions. The court of appeals has concluded,[105] and Defendants have conceded,[106] that Plaintiffs' antitrust claims could not be asserted in a foreign tribunal. Thus the district court would have assumed the power, for reasons of convenience, to abolish rights granted to Plaintiffs by Congress. It is significant that Defendants have found not a single decision reaching this impossible result.

Whether common law *forum non conveniens* could apply in this case is a moot point. Although the district judge did not discuss the issue, dismissal of this case under that doctrine would be an abuse of discretion. It was the Houston office of Mitsui-USA which first advised its parent of Plaintiffs' proposed operations. It was also the Houston office of Mitsui-USA which entered and performed the contract which eliminated Plaintiffs from competition.[107] And, for a variety of reasons, there is no other forum in which these Plaintiffs could obtain meaningful relief.[108]

Defendants did not raise the issue of *forum non conveniens* in their second petition for writ of certiorari. That ommission was a waiver of the issue on this third petition. In *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961), this Court held that a claim which could have been, but was not, raised in a prior petition for writ of certiorari had been

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[104] 671 F.2d at 890.

[105] *Id.*

[106] Petition, p. 22.

[107] *See* footnotes 44, 56, 57, *supra*, and accompanying text.

[108] Defendants conceded below that Mitsui-USA could not be sued in Indonesia. Brief of Appellees, p. 29, No. 81-2175, United States Court of Appeals for the Fifth Circuit. There is no evidence that Mitsui-Japan has assets in Indonesia from which a judgment could be collected.

abandoned. This Court has also refused to consider matters which were ruled on by courts of appeal but not raised in petitions for writ of certiorari. *Prudence Co.* v. *Fidelity & Deposit Co.*, 297 U.S. 198 (1936); *Erie Railroad Co.* v. *Collins*, 253 U.S. 77 (1920).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been delivered to the attorneys for Petitioner, Mr. Thomas R. McDade, Fulbright & Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, on October 17, 1983.

LOUIS PAINE